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## THE SPEECH OF JUSTICE

CONSERVATIVE political opinion in America cleaves to the tradition of the judge as passive interpreter, believing that his absolute loyalty to authoritative law is the price of his immunity from political pressure and of the security of his tenure. Therefore, since he should have no aim but to understand the law as he finds it, conservative opinion finds it monstrous to require of him results which shall suit the changing popular aspirations, which, being unformulated, must be vague, undifferentiated, and fragmentary. His is the rôle of a faithful administrator whose success depends upon his interpretation of the written word, not of the full heart. In its passionate adherence to this tradition such opinion is not disinterested; it would as eagerly encourage judicial initiative, if the laws were framed by labor unions, as it insists upon rigid obedience in a system framed for the most part for the protection of property and for the prevention of thoroughgoing social regulation. Under such a system nothing seems to it more subversive of ordered liberty than to permit the judge to make a personal interpretation of the uncertain and distracted yearnings of a supposititious public opinion.

This attitude is in part right and in part wrong. Much of the law is indeed written in formal shape, the authoritative emanation of the state through agencies to which the judge is confessedly inferior. Beyond the limits of such ambiguity as the words may honestly carry the judge surely has no duty but to understand, and to bring to his understanding good faith and dutiful acquiescence. For the results he may not justly be held accountable; to hold him is to disregard the social will, which has imposed upon him that very quiescence that prevents the effectuation of his personal notions. There is a hierarchy of power in which the judge stands low; he has no right to divinations of public opinion which run counter to its last formal expressions. Nevertheless, the judge has, by custom, his own proper representative character as a complementary organ of the social will, and in so far as conservative sentiment, in the excess of caution that he shall be obedient, frustrates his free power by interpretation to manifest the

half-framed purposes of his time, it misconceives the historical significance of his position and will in the end render him incompetent to perform the very duties upon which it lays so much emphasis. The profession of the law of which he is a part is charged with the articulation and final incidence of the successive efforts towards justice; it must feel the circulation of the communal blood or it will wither and drop off, a useless member.

When Plato tried to define justice, he found he could not stop short of building a commonwealth. No concept would answer which did not comprise the sum of the citizen's relations to the state at large. Yet we know that such a definition does not define until it be filled with purposes which the people feel and the state sets out to realize. Ulpian might take as the constitutive principle of justice the steady and eternal purpose to give each man his own, but no *a priori* concepts can determine in advance what each man's own shall be, and the form of justice will be without content till we fill it with the ardor of life. It can from time to time become realized in fragmentary compromises, the ingenious expedients of those who can penetrate and satisfy the cravings of the time, but it will submit to no eternal rationalistic, any more than any other manifestation of the human soul.

Two conditions are essential to the realization of justice according to law. The law must have an authority supreme over the will of the individual, and such an authority can arise only from a background of social acquiescence, which gives it the voice of indefinitely greater numbers than those of its expositors. Thus, the law surpasses the deliverances of even the most exalted of its prophets; the momentum of its composite will alone makes it effective to coerce the individual and reconciles him to his subserviency. The pious traditionalism of the law has its roots in a sound conviction of this necessity; it must be content to lag behind the best inspiration of its time until it feels behind it the weight of such general acceptance as will give sanction to its pretension to unquestioned dictation. Yet with this piety must go a taste for courageous experiment, by which alone the law has been built as we have it, an indubitable structure, organic and living. It is in this aspect that the profession of the law is in danger of failing in times like our own when deep changes are taking place in the convictions of men. It is not as the priests of a completed

revelation that the living successors of past lawmakers can most truly show their reverence or continue the traditions which they affect to regard. If they forget their pragmatic origin, they omit the most pregnant element of the faith they profess and of which they would henceforth become only the spurious and egregious descendants. Only as an articulate organ of the half-understood aspirations of living men, constantly recasting and adapting existing forms, bringing to the high light of expression the dumb impulses of the present, can they continue in the course of the ancestors whom they revere.

Yet the conditions of the enterprise have changed. Until within a very few decades the American bench and bar could utter justice without misgiving or constraint. Differences of course there were, but the self-conscious elements of society were homogeneous and the divergences not fundamentally distracting. At least, such genuine distraction as there was was latent, class grievances were inaudible, justice might be vague but it was consistent. Lawyers got by a kind of natural right the authority to interpret justice, since they were in a broad sense genuine representatives of all that could achieve representation. Nor was it different in Great Britain. When Lord Mansfield made the modern commercial law of England, he had no need to force his native convictions; he spoke with authority because the resultant of values in his mind substantially accorded with that of all other men who ever conceived that their scale of values could gain any effective recognition.

All this has changed; the profession is still drawn, and so far as we can see, will always be drawn, from the propertied class, but other classes have awakened to conscious control of their fate, their demands are vocal which before were dumb, and they will no longer be disregarded. If justice be a passable accommodation between the vital and self-conscious interests of society, it has taken on a meaning not known before. But the profession has not yet learned to adapt itself to the change; that most difficult of adjustments has not been made, an understanding of and sympathy with the purposes and ideals of those parts of the common society whose interests are discordant with its own. Yet nothing can be more certain than that its authority as interpreter of customary law must in the end depend upon its power to

learn precisely that adaptation. As mediator it must grasp from within the meaning of each phase of social will; it must divine the form of what lies confused and unexpressed and must bring to light the substance of what is half surmised. To adjust and to compromise, to balance and to value, one must first of all learn to know, not from the outside, but as the will knows. This is the condition of the continued high position of the lawyer; without this he must degenerate to a mere rational automaton, expounding a barren scholasticism which his society will quickly learn to value at its true worth.

It may be said that this fate is in any event inevitable, that the obvious purport of the present is towards an increasing body of minute formularies which leave no option and permit no latitude. Yet one must not be too hasty to confuse cause with effect. A large part of the tendency towards such meticulous prolixity rests in the very inability of the profession to show a more enlightened sympathy with the deeper aspirations of the time. Moreover, as we are coming now to learn, no human purpose possesses itself so completely in advance as to admit of final definition. Life overflows its moulds and the will outstrips its own universals. Men cannot know their own meaning till the variety of its manifestations is disclosed in its final impacts, and the full content of no design is grasped till it has got beyond its general formulation and become differentiated in its last incidence. It should be, and it may be, the function of the profession to manifest such purposes in their completeness if it can achieve the genuine loyalty which comes not from obedience, but from the according will, for interpretation is a mode of the will and understanding is a choice.

In so far as we have realized that definition must follow application, the movement has been to intrust broad powers to administrative commissions, which thus become charged with the execution of wide legislative purposes, and which establish upon them a customary law through the slow accretion of their own precedents. Such functions should more properly lie with courts, who by training and experience ought to be better fitted for their discharge. The movement reflects a suspicion of courts in the end resting upon that very scrupulousness to the written word which has been their undoing. Yet they stand in a dilemma, because, while no ritualistic piety can save them from the necessity of an active partisanship

amid the contests of their time, their partiality must endure the final test of a genuine social ideal which shall be free from class prejudice. Like every public functionary, in the end they are charged with the responsibility of choosing but of choosing well. Courage and insight alone can in the end win confidence and power. Democracy must learn to value and to trust such qualities or democracy cannot disentangle its true purposes and realize its vaguely formed ideals; but democracy is quick to understand those who respond to its fundamental feelings, and is ruthless in casting aside those who seek cover behind the protection of the written word, for which it may, and even in the same breath, itself profess reverence.

The profession of the law has its fate in its own hands; it may continue to represent a larger, more varied social will by a broader, more comprehensive interpretation. The change must come from within; the profession must satisfy its community by becoming itself satisfied with the community. It must assimilate society before society will assimilate it; it must become organic to remain a living organ. No political mechanism designed to accomplish this by fear will succeed, if the inward disloyalty of purpose remain. The lawyer must either learn to live more capaciously or be content to find himself continuously less trusted, more circumscribed, till he becomes hardly more important than a minor administrator, confined to a monotonous round of record and routine, without dignity, inspiration, or respect. There can be no ambiguity in the answer of those who are worthy of the traditions and the power of a noble calling.

*Learned Hand.*

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